IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 31ST JULY 2007 / 9TH SRAVANA 1929

RSA.No. 569 of 2007()

AS.48/2004 of ADDL. DISTRICT COURT-II, KOZHIKODE
OS.561/2001 of PRL.M.C.KOZHIKODE-I

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APPELLANTS/ APPELLANTS/DEFENDANTS 1 TO 3:

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1. VALSON ADOLPH, S/O.LATE R.V.ADOLPH,
   AGED 57 YEARS, RESIDING AT SHARON, ELATHUR AMSOM
   PUTHUR DESOM, KOZHIKODE TALUK.

2. A.L.AGNES, AGED 56 YEARS,
   W/O.VALSON ADOLPH, RESIDING AT SHARON, ELATHUR
   AMOSM PUTHUR DESOM, KOZHIKODE TALUK.

3. KELAPPAN, S/O.SAMI, AGED 69 YEARS,
   RESIDING AT MANEDATH HOUSE, ELATHUR AMSOM
   PUTHUR DESOM, KOZHIKODE TALUK.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENT/ RESPONDENT/PLAINTIFF:

PADANNAYIL SOMANATH, S/O.BAPPU,
AGED 59 YEARS, ELATHUR AMSOM PUTHUR DESOM,
KOZHIKODE TALUK.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 31/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.1183/07 IN RSA 569/07

DISMISSED

31/7/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 569 OF 2007

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Dated this the 31st day of July, 2007

JUDGMENT

Defendants 1 to 3 in O.S.561/2001 on the file of Munsiff Court, Kozhikode are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint A and B schedule properties belong to him and plaint B schedule property is a way which is owned by the respondent as purchased by him for the convenient entry to his property and the property of the third appellant is on the immediate eastern and southern side of the plaint A schedule property and there is a way on the southern side of that property and plaint A schedule property and the property of appellants 1 and 2 and the property of fourth appellant are on the southern side of the way and the said way was provided for access to the plaint A schedule property and properties of appellants

and that way leads to a road called "poorathara road" which is on the east and respondent purchased plaint schedule property in 1993 and appellants have no manner of right over the plaint B schedule property and they attempted to demolish the wall on the boundary of plaint B schedule way and they have no right to do so and therefore they are to be restrained by a permanent prohibitory injunction. Defendants 1 to 3 along with the 4th defendant filed a written statement contending that the way to the properties of the respondent and the appellants lead from the Highway on the western side and the appellants have a right to use the plaint B schedule way and they paid the consideration for the way and they are holding the properties along with the respondent and in the partition executed by the landladies in 1985, there was an express provision for the common usage of the pathway from the western road and that way is referred to in the title deed of the respondent also and they have acquired a right of easement by prescription and

the poorathara road is a private road and appellants have no right to use that way and therefore respondent is not entitled to the decree sought for. Third appellant in the additional written statement contended that he is an unnecessary party to the suit and the property on the eastern side of the plaint A schedule property is not owned by him but by his son and daughter and they are necessary parties.

2. Learned Munsiff on the evidence of PW1, Dws.1 and 2, CW1 and Exts.A1 to A3, B1 to B7 and Exts.C1 to C3 granted a decree in favour of the respondent restraining defendants from trespassing into plaint B schedule pathway as well as plaint A schedule property, upholding the right of the respondent and rejecting the claim for a right of way raised by the appellants. Defendants 1 to 3 challenged the decree and judgment before District Court in A.S.48/2004. Learned Additional District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the

appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellants was heard.

4. The argument of learned counsel is that courts below did not properly appreciate the evidence and when Ext.B7 partition deed provides for a way and the title deed of the appellants also establish the existence of a way, courts below should have found that appellants have a right of way over the plaint B schedule property and therefore the decree granted is unsustainable.

5. On hearing learned counsel and on going through the judgments of the courts below, I do not find any substantial question of law involved in the appeal. Though it was contended that Ext.B7 partition deed provides for a right of way, on going through the copy of Ext.B7 made available, I cannot agree with the submission. As rightly found by the courts below, Ext.B7 does not provide for a way, over the properties divided thereunder, though it refers to the right which was in

existence to the entire properties. Though learned counsel argued that right of way available at the time of partition should be available to the appellant being the assignee of one of the sharers when the properties are divided under Ext.B7, in respect of portion of the property divided thereunder, a right of easement by prescription could be claimed only after the expiry of the prescribed period provided for claiming a right of easement by prescription, because a right of easement by prescription over a portion of the property which was common till the partition, cannot be claimed. Learned Munsiff as well as learned Additional District Judge appreciated the evidence in the proper perspective and found that appellants did not have a right of way either by grant or prescription. Learned counsel appellants argued that as the appellants contended that there is no other way available to their property they have a right of easement by necessity. But the ingredients of a right of

easement by necessity as such was not pleaded. Even otherwise courts below on the evidence found that there is another way available to the property in which case the right of easement by necessity cannot be claimed. That factual findings cannot be challenged.

Appeal is dismissed in limine, as no substantial question of law is involved.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006